BRB No. 08-0681 BLA

A.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEERLESS EAGLE COAL COMPANY	)	DATE ISSUED: 06/10/2009
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (05-BLA-05296) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This is the second time this case has been on appeal before the Board. In its prior Decision

and Order, the Board vacated the award of benefits and remanded the case to the administrative law judge to reconsider whether the newly submitted evidence alone, without consideration of the evidence submitted in prior claims, established a change in at least one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309.[1] In this case, the issue to be resolved was whether complicated pneumoconiosis was established[2] and whether claimant was, therefore, entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Specifically, the Board held that the administrative law judge erred in finding complicated pneumoconiosis established because he did not confine his analysis of that issue to the evidence developed after the prior denial of benefits. Thus, the Board held that the administrative law judge erred in finding that a change in an applicable condition of entitlement was established at Section

[1] The lengthy procedural history of this case is set forth in the Board's prior Decision and Order. *A.R. v. Peerless Eagle Coal Co.*, BRB No. 07-0267 BLA (Nov. 23, 2007) (unpub.).

[2] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of totally disabling pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B); when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). However, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge must examine all of the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

725.309. The Board held that the administrative law judge impermissibly relied on both old and new evidence in finding that complicated pneumoconiosis and therefore a change in an applicable condition of entitlement was established. *See A.R. v. Peerless Eagle Coal Co.*, BRB No. 07-0267 BLA (Nov. 23, 2007)(unpub.). On remand, the administrative law judge stated that he found that the new evidence, submitted in support of the subsequent claim, established complicated pneumoconiosis when considered in light of the prior evidence and, thereby, established invocation of the presumption pursuant to Section 718.304.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge failed to follow the Board's remand instructions and made the same errors in evaluating the evidence as he did in his first decision, in that he impermissibly considered the new evidence with the old evidence in determining whether a change in an applicable condition of entitlement was established at Section 725.309(d). Claimant responds, urging that the decision of the administrative law judge awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[3] The administrative law judge stated that he utilized evidence showing the existence of simple pneumoconiosis from the prior claim in order to determine the credibility of new evidence showing complicated pneumoconiosis. Decision and Order on Remand at 3-4.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 7.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish total disability.[5] Director's Exhibits 1-3. Consequently, in order to establish entitlement, claimant had to submit new evidence establishing that element of entitlement in order to obtain review of the case on the merits. 20 C.F.R. §725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Employer argues that the administrative law judge erred in considering the old and the new evidence together in determining whether complicated pneumoconiosis and, thereby, a change in an applicable condition of entitlement was established at Section 725.309(d). We agree.

The old and new evidence is not to be considered together in determining whether a change in an applicable condition of entitlement is established at Section 725.309(d). Only if the administrative law judge determines that the new evidence alone establishes a change in an applicable condition of entitlement is he then to consider together all of the evidence, both old and new, to determine whether entitlement is established on the merits. Thus, to the extent the administrative law judge considered both the old and the new evidence together in finding that complicated pneumoconiosis and, therefore, a change in an applicable condition of entitlement was established, he erred. *See* Decision and Order on Remand at 3; 20 C.F.R. §725.309(d).[6] Further, contrary to the administrative law judge's finding that the new evidence cannot be considered without considering the old evidence at Section 725.309, because the old evidence is relevant to determining the credibility of the new evidence, we note that any effect the old evidence

[5] Claimant concedes that the evidence does not independently establish a totally disabling respiratory impairment, but contends that this element of entitlement is nonetheless established because the evidence establishes complicated pneumoconiosis, thereby entitling him to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304. *See A.R. v. Peerless Eagle Coal Co.*, 2005-BLA-05296 (Nov. 9, 2006) (unpub.); Hr. Tr. at 6.

[6] Employer also contends that the new evidence alone does not establish complicated pneumoconiosis. However, since the administrative law judge did not make separate findings based only on the new evidence, we cannot address employer's argument.

may have on the credibility of the new evidence is a matter to be decided after the administrative law judge determines the threshold issue of whether the new evidence alone establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309. If the new evidence considered alone establishes that threshold issue, the administrative law judge must then determine whether all of the evidence of record, both old and new, when weighed together, establishes entitlement. In so doing, the administrative law judge must weigh the credibility of all of the evidence of record. The administrative law judge's decision awarding benefits is, accordingly, vacated and the case is remanded for the administrative law judge to determine whether the new evidence alone establishes complicated pneumoconiosis and, thereby, a change in an applicable condition of entitlement at Section 725.309(d).[7] If the administrative law judge determines that the new evidence establishes a change in an applicable condition of entitlement, he must then consider all of the evidence, both old and new, in order to determine whether entitlement is established on the merits.

Finally, in light of the Board's previous remand of this case and the administrative law judge's repetition of error on remand, we conclude that "review of this claim requires a fresh look at the evidence…." *Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we reluctantly direct that the case be assigned to a different administrative law judge on remand.

[7] We cannot hold that the administrative law judge's consideration of old and new evidence at Section 725.309 is harmless error and that his finding of complicated pneumoconiosis, based on his consideration of both the old and new evidence together, may be affirmed, since the administrative law judge stated that he did not consider *all* of the old evidence. *See* Decision and Order on Remand at 3.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge